In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 85

ANDRIJA ARTUKOVIC, PETITIONER

v.

RAFO IVANCEVIC, CONSUL GENERAL OF THE FEDERAL PEOPLES' REPUBLIC OF YUGOSLAVIA

ANDRIJA ARTUKOVIC, PETITIONER

v.

JAMES J. BOYLE, UNITED STATES MARSHAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

THE INTEREST OF THE UNITED STATES

Pursuant to Rule 42 of the Rules of this Court, the United States as *amicus curiae* submits herewith its brief in opposition to the granting of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

As appears from the opinion below (R. 406, fn. 4), the United States filed a brief as *amicus curiae* in the Court of Appeals because of the adverse effects on the interests of the United States of the decision of the district court, holding that the 1902 extradition treaty with the Kingdom of Serbia did not survive the creation in 1918 and 1919 of the Kingdom of the Serbs, Croats and Slovenes, and therefore did not apply to the present successor of that government, the Federal Peoples' Republic of Yugoslavia. Since the political departments of both the United States and Yugoslavia [1] have recognized the continuing binding effect of treaties made with the Kingdom of Serbia, not only as to extradition but as to other matters as well, the issue has an importance in the conduct of the external affairs of the United States which transcends the immediate facts of this case. Indeed, to the extent that the decision of the district court could be interpreted to hold that a change in the form of government or the expansion of the geographical bounds of a state resulted in the termination of treaty relations with that state, it tended to cause confusion in treaty relationships generally, since there are few countries now existing with which the United States has concluded treaties that have

[1] The term Yugoslavia is used to refer to the Kingdom of the Serbs, Croats and Slovenes, its successor, the Kingdom of Yugoslavia, and the present government, the Federal Peoples' Republic of Yugoslovia.

not undergone some change, either with respect to their form of government or their boundaries.

While the Court of Appeals has corrected the errors of the district court in a careful and detailed opinion, the United States files this brief as *amicus curiae* to reaffirm its interest in the matter and to set forth the reasons why it believes that there is no necessity for further review by writ of certiorari.

ARGUMENT

1. Petitioner admits that since 1921 both the United States and Yugoslavia have recognized as binding, upon both parties, treaties theretofore made between the United States and the Kingdom of Serbia (Pet. 18). He argues, however, that in actuality the treaty with Serbia had come to an end when the "new state" of Yugoslavia was created in 1918 and 1919, that in the period from 1918 to 1921 the United States considered Yugoslavia a "new" state, and that therefore the 1921 recognition of the earlier treaty with Serbia was an invalid attempt to revive an abrogated treaty.[2] The argument falls with its factual premise that Serbia was so completely obliterated in 1918 that

[2] In *Terlinden* v. *Ames*, 184 U. S. 270, 285, this Court left unanswered the question whether a lapsed treaty can be revived by mutual consent of the high contracting parties. For the reasons set forth in the text, we believe that this issue is not present here. It is the government's view that there was no hiatus in our treaty relationship with Serbia when that country was expanded to become Yugoslavia.

its treaty rights and obligations were not assumed by Yugoslavia.

None of the historical incidents and diplomatic correspondence cited by petitioner (Pet. 7–11) tends to support his thesis. To the contrary, they show that the union of Serbia with certain Slav groups was formed at the invitation of the Kingdom of Serbia and that Crown Prince Alexander, former Regent of Serbia, became its chief executive. The letter of the Commission to Negotiate Peace cited by petitioner (Pet. 10–11) speaks of the new union as a union of Jugo Slavs formerly under Austro-Hungarian rule with the Kingdom of Serbia. And the acts of recognition of the expanded confederation cited by petitioner point to the continuity of sovereignty rather than an extinguishment of the Serbian state. Cf. *Terlinden* v. *Ames,* 184 U. S. 270, 283. The issue is fully discussed in the brief in opposition filed on behalf of respondents (pp. 7–19), and we do not deem it necessary to repeat here the numerous instances which show that in the period from 1919 to 1921 the United States considered the Yugoslav state as resulting from a union of other territories with Serbia, and not as a total extinction of Serbia.

In the absence of any support for petitioner's premise that official recognition was given to a termination of the treaty relations of the United States with Serbia at the time of its union into the consolidated state of the Serbs, Croats, and

Slovenes in the 1918–1919 period, his petition fails to state a justiciable issue. This Court has consistently abstained from inquiry into matters relating purely to foreign affairs, and has refrained from making independent evaluations of foreign policy matters. For example, the government recognized by the President as the government of a foreign sovereign state will be accepted without question. *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *United States* v. *Belmont,* 301 U. S. 324, 330; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 132–138; *United States* v. *Pink,* 315 U. S. 203, 229. The question of treaty survival is a question of the same character and often is closely enmeshed with the question of recognition by the United States of the existence and character of a foreign sovereignty. Both questions require the making of political judgments, and therefore, lie primarily within the sphere of knowledge and authority of the executive.

This Court has on several occasions recognized this principle in connection with inquiry into the current validity of treaties following political and geographic changes in the original signatories. In *Terlinden* v. *Ames,* 184 U. S. 270, the contention was made that an extradition treaty entered into with the Kingdom of Prussia in 1852 failed to survive the consolidations and political changes leading up to the creation of the German Empire. This Court, in sustaining the continued validity of

the treaty as between the United States and the German Empire, said (184 U. S. at 288):

> We concur in the view that the question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard.

More recently, in *Clark* v. *Allen,* 331 U. S. 503, the Court, in rejecting the proposition that a treaty with Germany relating to property rights of nationals failed to survive the changes wrought by World War II in the composition and political status of that country, stated (331 U. S. at p. 514):

> It is argued, however, that the Treaty of 1923 with Germany must be held to have failed to survive the war, since Germany, as a result of its defeat and the occupation by the Allies, has ceased to exist as an independent national or international community. But the question whether a state is in a position to perform its treaty obligations is essentially a political question. *Terlinden* v. *Ames,* 184 U. S. 270, 288. We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligation of either party in respect to them. The Allied Control Council has, indeed, assumed

> control of Germany's foreign affairs and treaty obligations—a policy and course of conduct by the political departments wholly consistent with the maintenance and enforcement, rather than the repudiation, of pre-existing treaties.

Cf. *Foster* v. *Neilson,* 2 Pet. 253, 307–309; *Williams* v. *The Suffolk Insurance Co.,* 13 Pet. 415, 420; *Charlton* v. *Kelly,* 229 U. S. 447, 474–476.

The principle of judicial abstention from the domain of foreign affairs would seem particularly applicable here where the Court is asked to evaluate the effect of political change contrary to the stated interpretation of both the executive branch of our Government and of the other party to the treaty.

2. An additional reason for the denial of certiorari is that the petition is premature. Although the judgment of the Court of Appeals directs the District Court to find that the 1902 extradition treaty subsists as a binding treaty between the United States and the Federal Peoples' Republic of Yugoslavia, it remands the cause to the District Court to "consider and adjudicate the issues raised by the pleadings" (R. 431).[3] The petition therefore is an application to this Court to consider in a piecemeal fashion one aspect of a case which has not been finally adjudicated in its

[3] The other issue, not determined by either of the courts below, is whether the crimes charged as the basis for extradition constitute political offenses for which petitioner may not be extradited (R. 23).

entirety. In the absence of an exceptional reason, this Court will not review a non-final judgment. *American Construction Company* v. *Jacksonville, T. & K. Ry. Co.,* 148 U. S. 372, 384–485. The logic of this practice is apparent. Interlocutory rulings may not, on final adjudication, constitute the *ratio decidendi* of the case; other issues may intervene, or at least may color the final remedy. Cf. *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, 30; *Cobbledick* v. *United States,* 309 U .S. 323; *Bank of Columbia* v. *Sweeny,* 1 Pet. 567, 569. Since there is no showing in the instant case that any prejudice would result from a complete adjudication in the habeas corpus proceeding of all the issues raised after remand, the petition is premature in the present posture of the case.

CONCLUSION

The instant petition is premature and the issues raised were correctly decided by the court below in accordance with well-established principles. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term 1954

No. 85

ANDRIJA ARTUKOVIC, *Petitioner,*

v.

RAFO IVANCEVIC, Counsel General of the Federal Peoples' Republic of Yugoslavia,

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ANDRIJA ARTUKOVIC, *Petitioner,*

v.

JAMES J. BOYLE, United States Marshal.

PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Andrija Artukovic, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled causes.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 211 F. 2d 565, and appears

also at pages 404-431 of the printed Transcript of Record filed herein.

The opinion of the District Court of the United States for the Southern District of California is reported at 107 F. Supp. 11, and appears at pages 35-92 of the printed Transcript of Record filed herein.

JURISDICTION

The judgment of the United States Court of Appeals was made and entered on February 19, 1954, in these causes, and the jurisdiction of this Honorable Court to review by writ of certiorari the said judgment of the Circuit Court was invoked in timely fashion by petitioner under Title 28, United States Code, Section 1254(1). Order of this Court denying writ of certiorari was entered October 14, 1954. This petition for rehearing is filed in due time under Rule 58.2, Revised Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

The facts of the case are set forth at pages 4 ff. in the original petition for a writ of certiorari filed herein, and for reasons of brevity are not repeated in the instant petition. There has been no important alteration of facts known to the petitioner.

REASONS FOR ALLOWANCE OF THE WRIT

This case involves an important question of the alleged existence of a treaty of extradition between the United States and the Federal Peoples' Republic of Yugoslavia which, admittedly, was executed and ratified by and between the United States and the Kingdom of Serbia in 1902. Such question has not been presented to this Honorable Court heretofore, and no similar question has been presented to this Honorable Court, so far as known to petitioner, with the possible exception of *Terlinden* v. *Ames,* 184 U.S. 270, decided February 24, 1902. The latter case specifically left undecided the question "whether extinguished treaties

can be renewed by tacit consent under our Constitution" (184 U.S. 270, 285), and petitioner believes this is exactly the question finally raised by the issues in the instant proceeding.

Accordingly, petitioner submits that the important question of whether executive compliance with constitutional requirements (Article II, Section 2, United States Constitution) has been given in treaty relations with Yugoslavia should be finally resolved by this Honorable Court.

The substance of the opinion of the United States Court of Appeals for the Ninth Circuit in these proceedings is "that the extradition treaty executed by and between the United States and Serbia in 1902 is a present, valid and effective treaty between the United States and the Federal Peoples' Republic of Yugoslavia, and has been a valid and effective treaty *continuously* since its execution between the United States and Serbia and *through the changes in the official title of the latter state* to its present title of the Federal Peoples' Republic of Yugoslavia." (Italics ours) (Tr. p. 429)

In other words, the Circuit Court decided that the Serbo-American extradition treaty of 1902 is in effect between the United States and the Federal Peoples' Republic of Yugoslavia because the latter state is and continuously has been Serbia under different names and forms.

The determination whether the Federal Peoples' Republic of Yugoslavia, known variously since December 1918 as the Kingdom of the Serbs, Croats and Slovenes, the Serb-Croat-Slovene State, the Kingdom of Yugoslavia, and finally by its present title, is and continuously has been Serbia, is a political decision in the conduct of foreign relations properly to be taken by the executive and legislative departments of the United States Government and, when taken, is controlling upon the courts of the United States. (See *Oetjen* v. *Central Leather Company,* 246 U.S. 297, 302).

Accordingly, if it shall appear that the United States Government, by its executive and/or legislative depart-

ments, *at any time* politically decided that Yugoslavia, under one or another of its various official titles, was not Serbia, then the Circuit Court has erred materially in its basic premise, and its conclusion that a 1902 treaty between the United States and Serbia is and has been continuously in effect between the United States and Yugoslavia is equally in error.

If this be true, then it is incumbent upon this Honorable Court to review the proceedings in the courts below, to decide whether the said treaty was at all times in effect, and, if found to have beeen extinguished temporarily at any time, to decide whether it was revived in accord with constitutional requirements.

In the original petition for writ of certiorari herein the petitioner set forth at pages 7-11 thereof numerous acts of the executive branch of the United States Government in the period 1918-1919 demonstrating that it regarded Serbia as extinguished in December 1918 by the voluntary union of states creating the state now known as Yugoslavia, and it appears unnecessary to review them herein.

Petitioner believes, however, that the following additional diplomatic and official statements and acts of the executive branch of the United States Government in 1919 compel recognition of the fact that the United States then took political decision that Yugoslavia (then known as the Kingdom of the Serbs, Croats and Slovenes) was a new and different state than the old Kingdom of Serbia.

On February 7, 1919 the Secretary of State of the United States gave out a "statement in regard to the union of the Yugo Slav peoples" reading, in part, as follows:

> " * * * After having achieved their freedom from foreign oppression the Yugo Slav[s] formerly under Austro-Hungarian rule on various occasions expressed the desire to unite with the Kingdom of Servia. The Servian Government on its part has publicly and officially *accepted* the union of the Serb, Croat and Slovene peoples. * * * " (italics added). (Tr. p. 89)

This is the first official position of the United States in 1919 in regard to the creation of the state presently known as Yugoslavia. This expression of the official position of the United States in 1919 was entirely ignored by the Circuit Court in considering the issues of state continuity and treaty validity raised in these proceedings, and is not even set forth in the Circuit Court decision although quoted by leading American authorities on the meaning of the recognition of the Yugoslav state in 1919. (I Hackworth, International Law, pages 219-222; I Hyde, International Law etc., page 155)

But these quoted words, forming a part of the official pronouncement of the United States Government, cannot be considered as meaningless, particularly when viewed in the light of the intense interest exhibited by the United States in the "Serbian Government's postion as to the character of relation to be established between Serbia and Yugoslav portion of Austria-Hungary if latter secure their liberty." (Foreign Relations, U.S., 1918 Supp. 1, Vol. I, page 823.)

Serbian Government officials represented in 1918 to the inquiring American diplomatic agent that there was to be a free and equal union between Serbia and liberated Yugoslav portion of Austria-Hungary—not an absorption or annexation of territory by Serbia. (See reports of U. S. Special Agent (Dodge) at Corfu, Foreign Relations, U. S., 1918, Supp. 1, Vol. I, pages 828 ff. and pages 852 ff., set forth in Appendix 1 to Petition for Writ of Certiorari filed in these proceedings).

Upon this background of facts and allegations known to the executive branch of the United States Government in 1919, the meaning of the language of the Secretary of State's public declaration of February 7, 1919 becomes clear: The United States was insisting publicly upon recognition that the creation of the Kingdom of the Serbs, Croats and Slovenes was the result of a free and equal union voluntarily entered into and not an absorption or annexation by Serbia. Thus the language, "The Servian Government on its part has publicly and officially *accepted* the

union * * * ." The United States specifically did not intend to, and did not then, recognize the union as an absorption or annexation by Serbia, but to the contrary recognized that the union had created a state which was not Serbia. The words, "accepted the union", can have no meaning associated with annexation or absorption, for it is patent that an annexing state does not "accept" its act of annexation.

The American authorities cited in these proceedings, including Hackworth, Hyde and the Department of State, are in agreement that by the said declaration of February 7, 1919 the United States publicly recognized a new international state now known as Yugoslavia.

Acting upon its publicly expressed decision that Yugoslavia of 1919 was a new State, the United States and other allied powers on September 10 1919, negotiated with that State the treaty of St. Germain-en-Laye, certain preambulatory clauses of which read:

> "Whereas the Serb, Croat and Slovene peoples of the former Austro-Hungarian Monarchy have of their own free will determined to unite with Serbia in a permanent union *for the purpose of forming a single sovereign independent State* under the title of the Kingdom of the Serbs, Croats and Slovenes, and
>
> "Whereas the Prince Regent of Serbia and the Serbian Government have *agreed* to this union, and in consequence the Kingdom of the Serbs, Croats and Slovenes has been constituted * * *." (Italics added)
>
> (3 Malloy, Treaties, Conventions, etc., pp. 3731 ff.)

Thus the official language of the United States Government in the conduct of its foreign relations described the union as being created by the free will of recently freed peoples and for the purpose of "forming a single sovereign independent State", and stated that the Serbian Government and its ruler agreed to this union. Not only is there in these words a complete repudiation of the concept that the United States then recognized the union as an absorption or annexation by Serbia, but there is the all-important

language of the purpose of the union—*to form* a single sovereign independent state.

This language—stated, it should be remembered, by the Yugoslav state as well as by the United States—is clear and unambiguous: the union was for the purpose of forming a single sovereign independent state. The words, "purpose of forming", indicate a clear intent to form something which did not, prior to the union, exist. The most superficial examination of international history will reveal that Serbia—at the moment of entering into the union of December 1918—had existed as a "single sovereign independent state" for forty years, during all of which period it had been recognized as such by the United States.

Thus, had it been intended or purposed by this union to enlarge Serbia, then a statement of purpose to form a single sovereign independent state would have been unnecessary and redundant, for Serbia was then and had been for many years exactly such a state and its mere enlarged size would not have affected this situation.

But, if it had been intended or purposed by this union to form a new State, not Serbia enlarged or otherwise, then the statement of such purpose in the preamble to the treaty would have been, and was, appropriate and necessary—particularly in view of Article 12 thereof which provided for the binding force of the old Serbian treaties between the new Yugoslav state and the United States and other signatory allied powers. (Malloy, Treaties, Conventions, etc. Vol. 3, pages 3731 ff.; Transcript of Record, page 62).

Thus the executive branch of the United States Government in 1919 again stated its decision that the Kingdom of the Serbs, Croats and Slovenes was a new state, not Serbia, and acting upon this state of affairs in view of American constitutional requirements, negotiated a treaty with the new state, an article of which—had the treaty been ratified by the United States Senate—would have made the Serbian treaties binding between the United States and the new Yugoslav state.

Therefore, if the United States Government did, in the conduct of its foreign relations in 1919, make a political decision that the Kingdom of the Serbs, Croats and Slovenes was a new state, not Serbia, then such decision should have been recognized and taken into consideration by the Circuit Court in its decision and, failing to do so, that Court's major premise that Yugoslavia (under its various names) is and always has been Serbia has been seriously breached, and its conclusion that because Serbia has always existed in one name or another the Serbian extradition treaty with the United States is presently valid and effective, is equally erroneous. This must be so because of the undisputed principle of international law, to which the executive branch of the United States Government adheres, that "A treaty to which only two states are parties is terminated when one of the parties becomes extinct."

Accordingly, if by the political decision of the United States in 1919 the Kingdom of Serbia became extinct, then the Serbian treaties with the United States were terminated by operation of this undisputed rule of international law.

Even though the executive branch of the United States government may have later reversed its 1919 decision that Yugoslavia was not Serbia, as it seemingly did in 1921 when the Solicitor of the State Department took, and the Secretary of State adopted, the position that "Serbia absorbed the territories which came to her as a result of the war", nevertheless the decision that the Yugoslavia of 1919 was not Serbia, and its concomitant result that Serbian treaties were terminated, remained in effect for more than two years.

Thus the question whether constitutional treaty-making restrictions were observed in the 1921 revival of Serbian treaties by the executive department of the United States Government has not been answered by the decision of the Circuit Court in these proceedings.

It is interesting to note that in 1922, when seeking to revive an 1856 extradition treaty between the United States

and Austria which had been declared abrogated by the peace treaty of Aug. 24, 1921 between the United States and Austria, the executive branch of our Government carefully observed the treaty-making requirements of Article II, Section 2, United States Constitution, and the President by written message sought the advice and consent of the United States Senate to such revival, which was given by formal Senate resolution of May 3, 1922. (7 Miller, Treaties & Other Internatl Acts of U. S., pp. 410-411.)

WHEREFORE, it is respectfully submitted that the order of this Honorable Court dated October 14, 1954, denying the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in these causes should be set aside, and a writ of certiorari be granted.

Respectfully submitted,

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I, Robert T. Reynolds, attorney for petitioner, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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